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CITATIONS

252523—53

In the Supreme Court of the United States

OCTOBER TERM, 1952

UNITED STATES OF AMERICA, PETITIONER

v.

HENRY DEBROW

UNITED STATES OF AMERICA, PETITIONER

v.

JAMES H. WILKINSON

UNITED STATES OF AMERICA, PETITIONER

v.

ROY F. BRASHIER

UNITED STATES OF AMERICA, PETITIONER

v.

CURTIS ROGERS

UNITED STATES OF AMERICA, PETITIONER

v.

FORREST B. JACKSON

PETITION FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

The Acting Solicitor General, on behalf of the United States, prays that writs of certiorari

issue to review the judgments of the United States Court of Appeals for the Fifth Circuit affirming the judgments dismissing the indictments.

OPINION BELOW

The majority and dissenting opinions in the Court of Appeals (R. 18–25)[1] are not yet reported.

JURISDICTION

The judgments of the Court of Appeals were entered on April 10, 1953 (R. 25). The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1). See also Rules 37 (b) (2) and 45 (a), F. R. Crim. P.

QUESTION PRESENTED

Whether the failure of a perjury indictment to allege the name of the person who administered the oath for an admittedly competent tribunal and that he had authority to administer the oath renders the indictment subject to dismissal for failure to state an offense.

STATUTES AND RULE INVOLVED

The pertinent statutes and Federal Rule of Criminal Procedure provide:

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[1] There is a separate record for each case. However, since the issue is the same in each case, and the court below wrote one opinion for all, references will be made only to the Debrow record, the only one in which the opinion appears. The judgments of the Court of Appeals appear at the following pages in the other records: Wilkinson, p. 19; Brashier, p. 17; Rogers, p. 11; Jackson, p. 15.

18 U. S. C. 1621:

> Whoever, having taken an oath before a competent tribunal, officer, or person, in any case in which a law of the United States authorizes an oath to be administered, that he will testify, declare, depose, or certify truly, or that any written testimony, declaration, deposition, or certificate by him subscribed, is true, willfully and contrary to such oath states or subscribes any material matter which he does not believe to be true, is guilty of perjury, and shall, except as otherwise expressly provided by law, be fined not more than $2,000 or imprisoned not more than five years, or both.

Section 5396, Revised Statutes, 2d ed. (18 U. S. C. [1940 ed.] 558), repealed by the Act of June 25, 1948, revising the Criminal Code (62 Stat. 683, 862):

> In every presentment or indictment prosecuted against any person for perjury, it shall be sufficient to set forth the substance of the offense charged upon the defendant, and by what court, and before whom the oath was taken, averring such court or person to have competent authority to administer the same, together with the proper averment to falsify the matter wherein the perjury is assigned, * * * without setting forth the commission or authority of the court or person before whom the perjury was committed.

Rule 7 (c):

> NATURE AND CONTENTS. The indictment or the information shall be a plain, concise and definite written statement of the essential facts constituting the offense charged. * * * It need not contain * * * any other matter not necessary to such statement. * * *

STATEMENT

Separate indictments were returned against respondents in July 1951 in the United States District Court for the Southern District of Mississippi charging violations of 18 U. S. C. 1621, *supra*, pp. 2–3 (R. 5–9). The pertinent portion of each indictment charged in identical language that in April 1951 (R. 5),

> the defendant herein, having duly taken an oath before a competent tribunal, to wit: a subcommittee of the Senate Committee on Expenditures in the Executive Departments known as the Investigations Subcommittee, a duly created and authorized subcommittee of the United States Senate conducting official hearings in the Southern District of Mississippi, and inquiring in a matter then and there pending before the said subcommittee in which a law of the United States authorizes that an oath be administered that he would testify truly, did unlawfully, knowingly and wilfully, and contrary to s. d oath, state a material matter which he did not believe to be true * * *.

Prior to trial, respondents moved to dismiss the indictments on the general grounds, *inter alia*, that they did not state an offense under 18 U. S. C. 1621 and did not state the essential elements of a perjury charge. Specifically, during oral argument before the District Court, respondents urged that the indictments were defective in the foregoing respects because they failed to allege the name of the officer who administered the oath and by what authority he acted. (R. 9–11). The District Court dismissed the indictments (R. 11). Relying on the decision of the Court of Appeals for the Fifth Circuit in *Hilliard* v. *United States*, 24 F. 2d 99, and on the provisions of Section 5396, Revised Statutes, 2d ed. (18 U. S. C. [1940 ed.] 558), it decided that allegations as to "who administered the oath and by what authority he acted" were essential elements of a perjury charge (R. 12–13).

On appeal, the Court of Appeals, with one judge dissenting, affirmed the judgments of the District Court, holding that "it is essential to inform the accused by whom it is charged that he was sworn, either by disclosing the name of the person administering the oath, or his official capacity and that he was in fact possessed of the requisite authority." (R. 21.) In so doing, the Court of Appeals referred to the provisions of R. S. 5396, in effect regarding the statute, even though repealed, as embodying the essential elements of the offense. It rejected the Government's contention

that the indictments complied with the provisions of Rule 7 (c), F. R. Crim. P., that an indictment "be a plain, concise and definite written statement of the essential facts."

The dissenting judge, in agreement with the Government's position, considered the majority holding "extremely technical" and "contrary to the letter and spirit of the pertinent Federal Rules of Criminal Procedure" (R. 23). In the dissenting judge's opinion, the allegation that respondents had "*duly* taken an oath before a competent tribunal" was a sufficient recitation of the essential facts required under Rule 7 (c), and the name and authority of the person administering the oath were merely details which were matters for proof on the trial (R. 24–25).

REASONS FOR GRANTING THE WRIT

In dismissing the indictments for failure to allege the name of the person who administered the oath and that he had authority to do so the decision below invalidates a form of perjury indictment which has been in general use since the repeal of R. S. 5396 (*supra*, p. 3) by the Act of June 25, 1948, revising the Criminal Code (62 Stat. 683). *E. g., United States* v. *Moran*, 194 F. 2d 623 (C. A. 2), certiorari denied, 343 U. S. 965; *United States* v. *Weber*, 197 F. 2d 237 (C. A. 2), certiorari denied, 344 U. S. 834; and *United States* v. *Hiss*, 185 F. 2d 822 (C. A. 2), certiorari denied, 340 U. S. 948. The present cases are the

first, so far as we know, in which this form of indictment has even been questioned during that time. The decision below brings into question the validity of the indictments in a number of current perjury prosecutions in the District of Columbia; *United States* v. *Rosenbaum*, No. 1722–51; *United States* v. *Robert W. Dudley*, No. 1724–51; *United States* v. *Herschel Young*, No. 1725–51; *United States* v. *E. Merl Young*, No. 355–53; *United States* v. *Lattimore*, No. 2879–52.[2] By the same token, it has injected an element of uncertainty as to the proper form of perjury indictments in other districts outside the Fifth

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[2] In the *Rosenbaum*, *Dudley* and two *Young* cases, pretrial motions like the ones in the instant cases were denied. The two Youngs have been convicted after jury trials. The *Rosenbaum* and *Dudley* cases have not yet been tried. In the *Lattimore* case, the District Court has under consideration a similar pretrial motion. In the *E. Merl Young* case, District Judge McGuire, on April 29, 1953, overruled a motion for a new trial which invoked the intervening decision of the Fifth Circuit in the instant cases. In his opinion, Judge McGuire stated that he found that decision "neither controlling nor persuasive" and that the dissenting judge below "has stated the law as it is today, at least in the Federal courts, and he has both reason and basic common sense on his side." Judge McGuire reached this conclusion notwithstanding that the District of Columbia Code (Title 23, § 204) still contains a provision like R. S. 5396. He did not regard this provision as requiring that the indictment set forth the name of the person before whom the oath was taken and his authority to administer the oath, and held that, in any event, any such requirement was superseded by Rule 7 (c) of the Rules of Criminal Procedure.

A similar post-conviction motion is pending in the *Herschel Young* case.

Circuit. Beyond this, by reaching back to a repealed statute (R. S. 5396, *supra*, p. 3, which required a perjury indictment to allege "before whom the oath was taken") to determine the sufficiency of an indictment as a pleading, the holding below has imported into modern criminal pleading outworn technical concepts which the Rules of Criminal Procedure were intended to abolish.

The decision below is, moreover, basically in conflict with the decision of the Court of Appeals for the Ninth Circuit in *United States* v. *Bickford*, 168 F. 2d 26, and represents a serious departure in principle from the decisions of this Court and of other courts of appeals as to the standards governing the validity of criminal indictments. See particularly *Roberts* v. *United States*, 137 F. 2d 412 (C. A. 4), certiorari denied, 320 U. S. 768, and *United States* v. *Polakoff*, 112 F. 2d 888, 890 (C. A. 2), discussed *infra*, pp. 12–13.

In the *Bickford* case, the court held sufficient an indictment for perjury, returned during the period between the promulgation of the Rules of Criminal Procedure in 1946 and the repeal of R. S. 5396 in 1948, in which it was alleged that a witness before a district court had taken an oath before the clerk of the court, even though there was no allegation that the clerk had authority to administer an oath. The court held that, since the authority of the clerk was implicit in the facts alleged, the indictment was sufficient to meet the

requirements of R. S. 5396; that, in any event, that statute must be regarded as having been superseded by Rule 7 (c) of the Rules of Criminal Procedure; and that since the indictment clearly alleged facts sufficient to inform the defendant of the acts with which he was charged and to protect him from a second prosecution for the same offense, it must be deemed sufficient under Rule 7 (c) and under the standards established by this Court in *Hagner* v. *United States*, 285 U. S. 427, 431, and *Berger* v. *United States*, 295 U. S. 78. See also *Glasser* v. *United States*, 315 U. S. 60, 66.

These conclusions are equally applicable in the present cases. Here, as in *Bickford*, the indictments amply apprised respondents of the crime charged; here, as in that case, the specific allegations—of an oath "duly" administered before a "competent tribunal"—clearly charged the taking of a proper oath, necessarily implying administration of the oath by an authorized person. Here, however, although by the time of the indictments, R. S. 5396 had been expressly repealed by Congress in the 1948 revision of the Criminal Code, the court below, contrary to the *Bickford* case, looked to that statute to determine the "essential facts" necessary to sustain a perjury indictment, and in so doing disregarded the mandate of Rule 7 (c) and the decisions of this Court referred to above.

Rule 7 (c) was adopted to simplify the language in indictments and eliminate technicalities. It provides in pertinent part that the indictment "shall be a plain, concise and definite written statement of the essential facts constituting the offense charged" and need not contain any matter not necessary to such statement. The very essence of such simplification is to discourage the pleading of great detail. See Holtzoff, *Reform of Federal Criminal Procedure,* 3 F. R. D. 445, 448–449; *United States* v. *Bickford,* 168 F. 2d 26, 27 (C. A. 9); *Hart* v. *United States,* 131 F. 2d 59–61 (C. A. 9).

As the dissenting judge pointed out, the questioned portion of the indictments in the instant cases meets the requirements of both the letter and spirit of Rule 7 (c). Insofar as the oath is concerned, all that the perjury statute requires is that the defendant take "an oath before a competent tribunal, officer, or person, in any case in which a law of the United States authorizes an oath to be administered." 18 U. S. C. 1621; see also *United States* v. *Norris,* 300 U. S. 564, 574; *United States* v. *Seavey,* 180 F. 2d 837, 839 (C. A. 3), certiorari denied, 339 U. S. 979; *Fotie* v. *United States,* 137 F. 2d 831, 840 (C. A. 8). Here, each indictment stated that the defendant had "duly taken an oath before a competent tribunal, to wit, a subcommittee of the Senate Committee on Expenditures in the Executive Department, a duly created and authorized subcom-

mittee of the United States Senate conducting official hearings in the Southern District of Mississippi, and inquiring in a matter then and there pending before the said subcommittee in which a law of the United States authorizes that an oath be administered." Accordingly, each indictment clearly and categorically, and in more detail than was necessary under Rule 7 (c), named the body before which the oath was taken and alleged that such body was a competent tribunal inquiring into a matter in which an oath was authorized to be administered. In addition, each stated that the oath was *duly* taken, which indicates that the oath was administered properly, that is, by a person with authority to administer it.

It is, of course, still essential under Rule 7 (c) and the perjury statute that the indictment allege that the oath was taken before proper authority. If the oath was taken before a court, the particular court should be specified; if before a tribunal of some other kind, the nature of the tribunal and its authority; and if before a person, his official capacity and authority. Where the oath is before a tribunal rather than a particular person, and the authority of the tribunal to administer oaths is alleged, the particular person who administered the oath for the tribunal becomes an insignificant detail, particularly where, as here, the competency and authority of the tribunal to administer oaths through its members is well es-

tablished.[3] The name of the officer who administered the oath is a detail of proof at the trial which, if it has any bearing on the defense, can be obtained by a motion for a bill of particulars. The omission of such a detail cannot be said to prejudice a defendant or make his defense more difficult. Certainly it does not render the indictment insufficient to inform the accused of the nature of the offense or to protect him from future prosecution for the same charge—the true test by which, under the decisions of this Court, the validity of an indictment must be judged. *Glasser* v. *United States*, 315 U. S. 60, 66; *Hagner* v. *United States*, 285 U. S. 427, 431; see also *United States* v. *Marcus*, 166 F. 2d 497, 500–501 (C. A. 3); *Todorow* v. *United States*, 173 F. 2d 439, 446–447 (C. A. 9), certiorari denied, 337 U. S. 925.

In comparable situations, the courts have held that the name of a particular person is not an essential fact which must be alleged in an indictment. Thus, in *Roberts* v. *United States*, 137 F. 2d 412, 414 (C. A. 4), certiorari denied, 320 U. S. 768, the court held that an indictment under the false claims statute (18 U. S. C. (1946 ed.) 80) which alleged that the claim had been presented to the Navy Department was sufficient with-

[3] It is clear that a Senate investigating committee appointed and authorized to inquire and take testimony under oath is a competent tribunal and that Members of Congress are authorized to administer oaths to witnesses in any matter pending in any congressional committee. *United States* v. *Norris*, 300 U. S. 564, 573; 2 U. S. C. 191.

out an allegation specifying the authority of the officer to whom the claim was presented and his authority to pay the claim. In *United States* v. *Polakoff*, 112 F. 2d 888, 890 (C. A. 2), an allegation that the accused conspired "to influence and impede the official actions of officers in and of the United States District Court" was held sufficient although the indictment did not allege who the officers were that were to be so impeded. The court said, "we do not see why, if the accused were really in ignorance of this detail, they could not have been fully protected by a bill of particulars." In both these decisions, the courts disregarded earlier decisions of a more technical period in which the name had been held to be essential. While technically distinguishable, these decisions are basically inconsistent with the decision below. Unless the clear standards of adequate notice and prevention of double jeopardy are to prevail in determining whether the essential facts have been alleged under Rule 7 (c), the basic purpose of the Rule will be frustrated.

CONCLUSION

For the reasons stated, it is respectfully submitted that this petition for writs of certiorari should be granted.

ROBERT L. STERN,
Acting Solicitor General.

APRIL 1953.

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